COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

In the Matter of the Interconnection Agreement Negotiations Between AT&T COMMUNICATIONS OF NEW ENGLAND, INC., TELEPORT COMMUNICATIONS GROUP, INC. and NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, Pursuant to 47 U.S.C. § 252.

D.P.U.
96-80/81
&

96-73/74

**COMMENTS BY AT&T COMMUNICATIONS OF NEW ENGLAND, INC., REGARDING BELL ATLANTIC'S LATEST PROPOSAL REGARDING THE PROVISIONING OF UNE-P AND OTHER UNE COMBINATIONS**

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## Introduction.

For over two years, Bell Atlantic-Massachusetts ("Bell Atlantic", or "BA-MA") has succeeded in its unilateral refusal to provide competing local exchange carriers ("CLECs") with non-discriminatory access to the unbundled network element platform

("UNE-P") or other technically feasible UNE combinations. In so doing, Bell Atlantic has prevented CLECs from being able to compete fairly, and has denied Massachusetts consumers the substantial benefits of meaningful local exchange competition. In its December 1, 1999, proposal, Bell Atlantic reversed course and for the first time expressed a willingness to act upon its statutory obligation to provide non-discriminatory access to UNEs, including non-discriminatory access to UNE-P and other technically feasible UNE combinations.

Yet even now, Bell Atlantic tries to maintain the option of reneging on its new position at any time. BA-MA explicitly tries to leave open the possibility that it will dream up new theories for restricting access to UNE-P in the future, asserting that it "reserves the right" to change its mind at any time. *See Bell Atlantic's 12/1/1999 Proposal* at 13 n.14. Given the long history of Bell Atlantic's efforts to deny CLECs a fair opportunity to compete by denying them non-discriminatory access to unrestricted UNE-P and other technically feasible UNE combinations, BA-MA's threat to change its mind at any moment must be taken very seriously.

It is important that the Department forestall that possibility, by entering a clear order which memorializes BA-MA's new-found willingness to provide unrestricted UNE-P and EELs. Such a Department order, requiring BA-MA to provide non-discriminatory access to unrestricted UNE-P, EELS, and other technically feasible UNE combinations, is critical. It is needed to prevent disruption of service to retail customers, and to permit CLECs to engage in rational business planning. Without such an order, CLECs would have no assurance that the Massachusetts wholesale market for UNEs will be stable and predictable. CLECs would be unable to market services to Massachusetts consumers knowing that their ability to continue to serve their customers will be at the mercy of BA-MA's whim.

Bell Atlantic has changed its tune on UNE-P at this late date - almost four years after the 1996 Telecommunications Act took effect - only because it has begun the process of seeking approval under 47 U.S.C. § 271 to enter the Massachusetts interLATA market. The Department warned BA-MA as early as March 1998 that failure to provide access to UNE combinations on non-discriminatory terms would imperil any future Section 271 application. *Phase 4-E Order* at 15. Bell Atlantic simply ignored this warning, because for years BA-MA was much more interested in preserving its local exchange monopoly than in seeking approval for long-distance entry. Only now, when BA-MA for the first time has started to get serious about actually filing an application with the FCC for Section 271 approval, has it deigned to do what the Department has urged literally for years: agree to provide CLECs with access to UNE-P and other UNE combinations.

The reasons why Bell Atlantic temporarily reversed course in the UNE-P filing made on December 1, 1999, are transparent. BA-MA's intransigence on providing UNE-P continued until very recently, when: (1) Bell Atlantic became serious about wanting to seem reasonable because it now wants favorable action by the FCC on a Section 271 petition; and (2) it became operationally impractical to implement a UNE combinations offering in Massachusetts that differs from other Bell Atlantic states, with different

business rules and systems needs. As the Department is aware, Bell Atlantic has entered into a settlement agreement before the FCC acknowledging its obligation to develop a uniform OSS (Operational Support Systems) interface across the Bell Atlantic footprint. Starting in February 2000 Bell Atlantic will be rolling out a uniform OSS interface through new software releases that must comply with the LSOG 4 standards. Only because it would be impracticable for BA-MA to continue to press for a more restrictive UNE-P policy in Massachusetts, while simultaneously developing the uniform OSS interface and pressing for Section 271 approval in Massachusetts, has BA-MA revised its prior policy on UNE-P and now complied with Department orders, by proposing to provide access to "unrestricted UNE-P." *Bell Atlantic's 12/1/1999 Proposal* at 20.

However, if at some point in the future Bell Atlantic develops the OSS capability to make substantially different UNE-P offerings in different states while maintaining a uniform OSS interface, it would undoubtedly attempt to modify its UNE combinations offerings in Massachusetts yet again. This would be extremely disruptive both to CLECs and to their customers.

The Department should enshrine Bell Atlantic's latest position in a binding order, to forestall the threat of such future disruption. With respect to UNE-P and other UNE combinations, Bell Atlantic has finally made the Department's job a bit easier. The Department should enter an order with the components specified in the Conclusion to these comments, to require Bell Atlantic to provide the UNE combination offerings that are suggested- but expressly never made binding - in BA-MA's December 1, 1999, Proposal.

## Procedural and Factual Background.

AT&T has been trying to get Bell Atlantic to provide UNEs in a commercially viable form literally for years. BA-MA's response has been unmitigated intransigence and delay. The facts show a clear pattern of BA-MA refusing to comply with its obligations under the Act to provide non-discriminatory access to UNEs, by denying CLECs with equal access to UNE-P and all other technically feasible UNE combinations.

The detail of this factual background is important, as it makes clear that BA-MA's current proposal to offer "unrestricted UNE-P" may in fact be just temporary, and thus should not be viewed by the Department as a genuine change of heart or a lasting change of policy. Indeed, this background demonstrates that the Department should approach BA-MA's latest UNE-P proposal cautiously, and enter an affirmative order to ensure that a policy of unrestricted access to UNE-P and other technically feasible UNE combinations remain in place. Without such an order, the history recounted below suggests that CLECs would not have sufficient assurance of stability to be able to enter the full local exchange market.

### *1. Starting in 1997, Bell Atlantic Refused to Provide UNEs in a Combined Form, Insisting Instead on the Most Inefficient and Disruptive Means Possible for Provisioning Multiple UNEs.*

In November 1997, Bell Atlantic suddenly and unilaterally refused to provide CLECs with any combination of UNEs. See *Phase 4-E Order* at 2. It insisted that the only way CLECs would ever be allowed to use more than one UNE to provide service to retail customers would be if the CLEC leases "collocation facilities in every central office in which the CLEC chooses to purchase this array of services," and to connect - or reconnect - individual UNEs within this collocation space. *Id.* at 11.

Before that time, Bell Atlantic had made clear that it planned to provide CLECs with the same access to UNE combinations enjoyed by BA-MA's retail operations. *Id* at 14. However, come November 1997, BA-MA took the position that in light of the October 14, 1997, decision by the United States Court of Appeals for the Eighth Circuit regarding the Act, BA-MA was not obligated to provide UNEs in a combined form, that it was no longer willing to do so, and that the Department was powerless to do anything about it. *Id.*

The Department found that this was unacceptable, holding that "Bell Atlantic's response to the Eighth Circuit Decision does not advance our or the Act's policy to create efficiency-enhancing conditions that would allow local exchange competition to develop and to deliver price and service benefits to the customers. Consequently, Bell Atlantic's policy is not conducive to its own goal of receiving authority from the FCC, under Section 271 of the Act, to originate interLATA calls in Massachusetts." *Id.* at 12-13.

From the start, AT&T demonstrated - through affirmative testimony as well as through cross-examination of BA-MA witnesses - that Bell Atlantic's mandatory collocation policy was discriminatory and would lead to substantial, and entirely avoidable, extra costs and potential for customer disruption. *Phase 4-E Decision* at 11-12. AT&T showed that, because of Bell Atlantic's obstreperous refusal to provide UNE combinations efficiently, "multiple human and computer coordinations required to 'hot cut' service to a CLEC customer will inevitably result in service interruptions." *Id.* at 11. Unfortunately, the evidence presented on this point in December 1997 has been proven true since then time and again, as Bell Atlantic's inability consistently to carry out a successful hot cut has resulted in disruption of customer service. AT&T also showed that "Bell Atlantic's proposed network reengineering requirements will result in substantial additional (and totally unnecessary) costs, almost all of which will be imposed on the CLECs." *Id.* at 11. Finally, AT&T proved that Bell Atlantic's refusal to provide UNE-P and other UNE combinations "will ensure that no CLEC order for UNEs will ever be able to flow through Bell Atlantic's ordering and provisioning OSSs [operational support systems] in the way that Bell Atlantic's own customer orders will flow through," and that "[t]his fact has both quality of service and cost consequences." *Id.* at 12.

The Department agreed with AT&T that "it cannot be overemphasized that all of the foregoing service quality and cost consequences are totally unnecessary. They result in no service improvement, no increase in functionality, no increase in network efficiently. They simply make it more expensive and more difficult for Bell Atlantic's competitors to serve their customers." *Phase 4-E Order* at 12 (quoting AT&T's brief, citations deleted). The Department noted that "these consequences are uncontroverted" by Bell Atlantic.

***2. Bell Atlantic Effectively Ignored the Department's Request That It Negotiate a Non-Discriminatory Means for Providing Access to Combinations of UNEs.***

In the *Phase 4-E Order*, the Department found that the Legislature's broad grant of powers to it included the power to regulate the provisioning of UNE combinations, and thus that the pertinent legal question was whether exercise of that state law authority would "not be inconsistent with the Act." *Phase 4-E Order* at 9-10. The Department declined to rule, however, on the issue of whether exercise of its state law authority to regulate the provisioning of UNE combinations would be consistent with the Act. The Department felt that it "would not be productive" to do so.

Instead, the Department "order[ed] the parties back to negotiations." *Phase 4-E Order* at 10-11, 16. The Department pointedly urged Bell Atlantic to agree to do the right thing, and provide CLECs with UNE-P and other UNE combinations. In the Department's words:

Recognizing the network efficiencies that would result from combining UNEs in the manner proposed by the CLECs - the method Bell Atlantic had planned to use for the months leading up to the ruling, using OSSs designed precisely for this purpose - Bell Atlantic still may voluntarily agree to provide such combinations. Indeed, such voluntary recombination by an ILEC might well plant "the seeds of Section 271 success."

*Id.* at 14-15.

Those further negotiations proved to be fruitless, as Bell Atlantic continued insisting that it would not provide UNE-P, and that CLECs would have to reassemble a functionality available to Bell Atlantic retail customers by rerouting the loop through a CLEC collocation facility. This unremitting intransigence by Bell Atlantic forced the Arbitrator to hold yet another round of UNE combination evidentiary hearings in May 1998, and forced the Department to decide and issue the Phase 4-J, 4-K, and 4-M orders, none of which succeeded in actually making BA-MA provide CLECs with non-discriminatory access to combinations of UNEs.

***3. After the Department Ordered Bell Atlantic to Provide UNE-P, BA-MA Strove to Subvert the Phase 4-J Order by Continuing to Dismember UNE Combinations in Violation of the Department's Order, and by Attempting to Impose Conditions Upon the Use of UNE Combinations.***

On March 19, 1999, the Department issued an unequivocal order that BA-MA must "make available to competing carriers existing combined UNEs, including the UNE platform, in their combined form, without a 'glue charge.'" *Phase 4-J Order* at 11. The Department also specified that BA-MA may not take apart existing combinations of elements "where doing so would thwart the intent of this directive," *e.g.*, by disassembling a UNE combination as soon as a retail customer discontinues service. *Phase 4-J Order* at 10 n.14.

Bell Atlantic has blithely ignored the Department's order, by routinely disconnecting loops from switches whenever a Bell Atlantic customers cancels service, for example because she is moving from a residential service location. In recent technical sessions in the ongoing Section 271 proceeding, Bell Atlantic representatives Amy Stern and Don Albert revealed that it is Bell Atlantic's general practice to disconnect the loop from the switch under such circumstances, by physically removing the wire(s) that previously connected them in order for Bell Atlantic to provide service. *See Docket DTE 99-271 Technical Session*, Tr. 11/18/1999 at 1500-1504 (Stern and Albert).

In addition, as part of its motion for reconsideration of the Phase 4-J Order, Bell Atlantic asked for an opportunity to propose unspecified "limitations" on the provisioning of UNE combinations. This request was properly denied. The Department stated that, "It is clear from previous evidence in this case that the disassembling of previously combined UNEs is, in fact, a wasteful practice (*see Phase 4-E Order* at 11-12), and this evidence must be given greater weight than Bell Atlantic's unsupported contentions in a footnote about implementation issues that 'may' occur with respect to 'certain' elements, which 'could' require a waste of resources." *Phase 4-M Order* at 10. The Department stated that its "directives in the *Phase 4-J Order* need no further modification or limitation." *Id.* The Department therefore denied Bell Atlantic's motion for reconsideration of the Phase 4-J Order.

***4. In the May 1999* Phase 4-K Order, *the Department Rejected the Mandatory Collocation Proposal Outright.***

In its Phase 4-K Order of May 21, 1999, the Department addressed BA-MA's continuing mandatory collocation proposal, under which CLECs would be required to collocate at a BA-MA facility in order to obtain access to any new combinations of UNEs. The Department held that BA-MA's refusal to provide additional combinations of UNEs except through a mandatory collocation arrangement is unlawful, both because it would compel CLECs to purchase some facilities merely to obtain access to functional combinations of UNEs, and because it is discriminatory in that BA-MA faces no such barrier in obtaining UNE combinations for its retail operations. *Phase 4-K Order* at 24-26, 28-30.

The Department emphasized that Bell Atlantic's obligation to provide access to UNE-P and other UNE combinations, in any technically feasible manner, is grounded in Bell Atlantic's statutory obligation to provide non-discriminatory access to UNEs. In the Department's words:

[47 U.S.C.] Section 251(c)(3) requires nondiscriminatory access to network elements. The quality of access that Bell Atlantic provides to the CLECs must be in parity with the quality of access it provides to itself. If that quality is not comparable, Bell Atlantic must prove that parity is not technically feasible. 47 C.F.R. § 51.311(b).

*Phase 4-K Order* at 28-29. *See also Phase 4-N Order* at 33 (rejecting Bell Atlantic's demand for a collocation requirement for dark fiber, on the ground that it is technically feasible to provide access to dark fiber without collocation).

The Department also reiterated that BA-MA's intransigent "refusal to provide" CLECs with fair access to combinations of UNEs is "impair[ing] the successful introduction of competition in Massachusetts" and therefore is denying "price and service benefits to consumers." *Phase 4-K Order* at 2.

The Department again underscored the significance of this ruling by expressly telling BA-MA that approval of a lawful, nondiscriminatory means of provisioning combinations of network elements that are not currently combined in the BA-MA network is a necessary "precondition for Bell Atlantic to receive a favorable ruling on a Section 271 filing." *Phase 4-K Order* at 27. Thus, for example, BA-MA is obligated to provide non-discriminatory access to any combination that BA-MA provides to its own retail customers, whether or not the combination happens already to be in place for a particular retail customer of the CLEC. The Department directed BA-MA to develop "an additional, alternative or supplemental method for provisioning previously un-combined UNEs in such a way that they can be recombined by competing carriers without imposing a facilities requirement on those carriers." *Phase 4-K Order* at 26-27.[(1)]

***5. Beginning in June 1999, Bell Atlantic Insisted that It Need Not Provide UNE-P If the Loop and Switch Happen Not to Be Connected At the Time of the CLEC's Order, and Again Sought to Impose Discriminatory and Unlawful Conditions Upon the Use of UNE Combinations.***

Despite the Department's long-term efforts to move this process forward toward resolution, Bell Atlantic insisted on taking a giant step backward, in its June 18, 1999, "Compliance Submission."

First, Bell Atlantic unilaterally asserted that it would not provide UNE-P where the loop and switch happen not to be connected at the time of the CLEC order, except under arbitrary and discriminatory conditions. *See Bell Atlantic's 6/18/99 Compliance Submission* at 4. This position flew in the face of Bell Atlantic's clear obligations under the Department's orders and under 47 C.F.R. § 315(b). The Department had reiterated - both in the Phase 4-J Order and in the order denying BA-MA's motion for reconsideration - that Bell Atlantic must provide all existing types of UNE combinations, "including the UNE platform," in their combined form. *See Phase 4-J Order* at 9-10; *Phase 4-M Order* at 4. The Department's repeated holding that UNE-P is an existing combination which Bell Atlantic typically provides for itself, and therefore must provide to CLECs under its statutory obligation to provide non-discriminatory access to UNEs, is consistent with the FCC's determination that "incumbent LECs are required to perform the functions necessary to combine those elements that are ordinarily combined within their network, in the manner in which they are typically combined." *FCC's Local Competition First Report and Order*, ¶ 296.

In the new UNE combinations proposal filed on December 1, 1999, Bell Atlantic concedes that 47 C.F.R. § 315(b) codifies this obligation to provide access to all types of UNE combinations that are "ordinarily combined" in the incumbents network, which of course would include UNE-P. *See Bell Atlantic's 12/1/99 Proposal* at 14. Thus, there was never any basis for BA-MA's June 1999 ploy, when it tried to deny CLEC's reasonable and non-discriminatory access to UNEs by insisting that it could avoid any obligation to provide UNE-P so long as it had managed to dismember an existing loop/switch combination before a CLEC placed an order for it. We now know that this baseless assertion was particularly pernicious, because all the time Bell Atlantic has been routinely disconnecting the loop from the switch whenever its customers cancel service, thereby violating its duty to leave existing

combinations intact for future use by CLECs. *See Docket DTE 99-271 Technical Session,* Tr. 11/18/1999 at 1500-1504 (Stern and Albert).

Second, BA-MA proposed a new set of conditions and charges that it sought to impose upon the provisioning of particular UNEs that happen not to be connected at the time a CLEC orders them. The arbitrary restrictions proposed by Bell Atlantic included the unilateral refusal: (i) to allow CLECs to use UNE-P or EELs for anything other than the provision of Plain Old Telephone Service ("POTS") or ISDN-Basic Rate Interface service; (ii) to provide UNE-P after 2003; or (ii) to provide UNE-P for service to business customers in central offices where any CLEC happened to be collocated

Third, BA-MA also proposed a set of unlawful surcharges for UNE combinations, which had no cost basis whatsoever. The Department had previously ruled that Bell Atlantic may not impose any "glue fee" as a condition for providing access to UNE-P (see *Phase 4-J Order* at 11), and that its mandatory collocation proposal was unlawfully discriminatory in part and would impose needless costs upon CLECs (see *Phase 4-K Order* at 29-30). Bell Atlantic chose to ignore those rulings, proposing a new glue charge "based on BA-MA's estimate of the collocation expenses that a CLEC will avoid through the purchase of BA-MA combined UNEs." *Bell Atlantic's 6/18/99 "Compliance Submission* at 6. Bell Atlantic also proposed a "quick flip charge," which was an effort to broaden the application of its arbitrary "glue fee" to include situations where a CLEC customer served through resale of Bell Atlantic services is converted to service through leased UNEs. *Id.*

AT&T challenged these various new conditions, restrictions, and charges proposed by Bell Atlantic, in a brief filed by AT&T on July 19, 1999. After the Department sought response to this AT&T filing, in order to rule upon the proposals contained in Bell Atlantic's June 18, 1999, submission, Bell Atlantic decided to change course and make an entirely new UNE-P and UNE combinations proposal That new proposal was filed on December 1, 1999.

## Argument.

There are two simple reasons why the Department should be very concerned about what would happen without a clear order ensuring unrestricted access to UNE-P, EELs, and other technically feasible UNE combinations. The first is BA-MA's track record. The determined efforts by Bell Atlantic to deny CLECs fair entry to the local exchange market by denying them non-discriminatory access to UNE-P underscores the need for a Department order ensuring unrestricted access to UNE-P and other UNE combinations. Second, BA-MA expressly states it "reserves the right" to limit the availability of UNE-P in the future, as soon as it thinks that it can get away with doing so. *Bell Atlantic's 12/1/1999 Proposal* at 13 n.14.

The Department should guard against this threat of future disruption by enshrining Bell Atlantic's brand-new commitment to provide access to UNE-P and other UNE combinations in an appropriate order. By so doing, the Department will make it possible for CLECs to develop meaningful business plans based on something concrete - unlike Bell Atlantic's often whimsical and easily changed unilateral positions. Such an order will similarly make it possible for KPMG to develop appropriate OSS testing procedures in the Section 271 docket, to ensure that Bell Atlantic really has the ability to provide UNE-P, EELs, and the Switch Sub-Platform at commercially acceptable volumes and in a commercially reasonable manner. Finally, a Department order will enhance local exchange competition in Massachusetts, by allaying the all-too-justified reluctance of CLECs to rely on BA-MA's representations on UNE-P, borne from two years of procedural wrangling on this issue by Bell Atlantic.

If Bell Atlantic believes that it is entitled as a result of the FCC *UNE Remand Order* to propose a change to the pricing of components of UNE-P, EELs, or the Switch Sub-Platform, then - as the Department has previously held - Bell Atlantic is obligated to engage in good faith negotiations with AT&T over the proposed changes, and then to submit any unresolved issues to the Department for arbitration. *See Phase 4-E Order* at 19-20.

## I. The Department Should Order BA-MA "To Provide Unrestricted UNE-P."

### A. Bell Atlantic's Agreement to Provide "Unrestricted UNE-P," Whether or Not the Loop and Switch Happen to Be Connected at the Time of the CLEC's Order, Should Be Memorialized In a Binding Order.

At long last, Bell Atlantic says that it will no longer resist its obligation to provide "unrestricted UNE-P" to CLECs in Massachusetts. *See Bell Atlantic's 12/1/99 Proposal* at 20. BA-MA indicates that it has now agreed to offer UNE-P: (i) throughout Massachusetts, at all central offices; (ii) at TELRIC prices, and with no glue charge or other non-cost based surcharge;(2) (iii) whether or not the loop and switch happen to be connected at the moment that the CLEC places its order; (iv) with no use limitations; and (v) with no time limitations. *Id.* at 5-8 and 13.

Incredibly, and rather disconcertingly, Bell Atlantic nonetheless urges the Department not to enter any order that would pin down this commitment. *Id.* at 13, 19-20. Based on Bell Atlantic's sorry track record on UNE-P in Massachusetts, it appears that BA-MA wants to assure the Department that BA-MA is intending to provide UNE-P for now - *i.e.*, just long enough to neutralize this issue as the Department decides whether to make a favorable recommendation on BA-MA's Section 271 application - while simultaneously characterizing its proposal as a "voluntary commitment" which Bell Atlantic "reserves the right" to change on a whim, at any time. *Id.* at 13 n.14.

This sort of "now you see it, now you don't" proposal is unacceptable, as it is not commercially reasonable and it is patently discriminatory. CLECs cannot make viable business plans if they cannot be sure that BA-MA will honor and live up to its legal obligation to provide non-discriminatory access to UNE-P. Bell Atlantic's retail operations do not operate under such a cloud, and CLECs should not have to do so either.

Given that Bell Atlantic has agreed to provide unrestricted UNE-P, no extended legal analysis is needed to support a Department order memorializing that commitment. The Department has the power to enter an order holding Bell Atlantic to the obligations it has acknowledged in its December 1, 1999, filing, and it should do so. *Cf. Phase 4-J Order* at 9 (holding Bell Atlantic to commitments it made to the FCC, by ordering BA-MA to provide existing UNE combinations, including UNE-P, notwithstanding Bell Atlantic's insistence that it was not required to do so because the FCC had not yet issued its *UNE Remand Order* regarding the definition of individual UNEs). Such an order will be an important part of the Department's procompetitive telecommunications policy.

Nonetheless, in light of BA-MA's erroneous suggestions to the contrary, the Department should note that there can no longer be any doubt about its power to enter such an order. The United States Court of Appeals for the Ninth Circuit has held that a state commission may lawfully order an incumbent local exchange carrier ("ILEC") to "combine requested elements in any technically feasible manner either with other elements from [the ILEC's] network, or with elements possessed by [a CLEC]," and that such an order is completely consistent with - and thus not preempted by - the 1996 Telecommunications Act. *See US West Communications* v. *MFS Intelenet, Inc.*, 193 F.3d 1112, ___ & n.7, 1999 WL 799082, *6-*7 & n.7 (9th Cir., Oct. 8, 1999). The key portion of the Ninth Circuit's decision states as follows:

In sustaining a provision that prohibited the incumbent from separating already-combined elements before leasing, the Supreme Court held that the phrase, "on an unbundled basis," does not necessarily mean "physically separated"; an equally reasonable interpretation is that it means separately priced. *AT & T*, 119 S.Ct. at 737. The Court also held that the statutory language requiring incumbent carriers to "provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service" indicates that network elements may be leased in discrete parts, but "does not say, or even remotely imply, that elements must be provided only in this fashion and never in combined form." *Id.* It follows, the Court held, that the FCC regulation prohibiting an incumbent carrier from separating already-combined network elements, see 47 C.F.R. § 51.315(b), was not inconsistent with the Act.

It also necessarily follows from *AT & T* that requiring U.S. West to combine unbundled network elements is not inconsistent with the Act: the MFS combination provision does not conflict with the Act because the Act does not say or imply that network elements may only be leased in discrete parts.

US West nevertheless argues that the Eighth Circuit's invalidation of the FCC regulation that required incumbent carriers to combine unbundled elements for competing carriers, *see* 47 C.F.R. § 51.315(c)-(f), requires this court to conclude that the MFS combination provision violates the Act. The Supreme Court opinion, however, undermined the Eighth Circuit's rationale for invalidating this regulation. Although the Supreme Court did not directly review the Eighth Circuit's invalidation of § 51.315(c)-(f), its interpretation of 47 U.S.C. § 251(c)(3) demonstrates that the Eighth Circuit erred when it concluded that the regulation was inconsistent with the Act. We must follow the Supreme Court's reading of the Act despite the Eighth Circuit's prior invalidation of the nearly identical FCC regulation.

*US West Communications*, 193 F.3d 1112, 1999 WL 799082, *6-*7.

Numerous state commissions have ordered Bell Atlantic and other ILECs to provide UNE-P and all other technically feasible combinations of UNEs. For example, AT&T asks that the Department take administrative notice of the following recent decisions:

**RHODE ISLAND** Public Utilities Commission, *In re Review of Bell Atlantic-Rhode Island TELRIC Studies*: *Unbundled Network Elements*, Docket No. 2681, Order issued December 6, 1999 (requiring Bell Atlantic to provide UNE-P and "any other combination of network elements in any technically feasible manner requested by a CLEC") (hereinafter, the "*Rhode Island UNE Combinations Order*");

**KANSAS** State Corporation Commission, *Petition by AT&T Communications of the Southwest, Inc. for Compulsory Arbitration of Unresolved* Issues *with Southwestern Bell Telephone Company Pursuant to § 252(b) of the Telecommunications Act of 1996*, Docket No. 97-AT&T 290-ARB, Order on Petition for Reconsideration dated November 4, 1999, at 2-5 (affirming arbitration order that Southwestern Bell must "combine unbundled network elements in any technically feasible manner at the request of AT&T", explaining that: (i) the Eighth Circuit's decision vacating 47 C.F.R. § 51.315(c)-(f) "was inconsistent with the Supreme Court's reasoning in *Iowa Utilities* with respect to 47 C.F.R. § 51.315(b); and (ii) "[i]n the alternative, the Commission relies on its general authority under Kansas statutes to require incumbent local exchange carriers to make available unbundled elements at the request of competitors");

*US West Communications* v. *MFS Intelenet, Inc.*, 193 F.3d 1112, 1999 WL 799082 (9th Cir. Oct. 8, 1999) (holding that an order by the **WASHINGTON** Utilities and Transportation Commission requiring US West to provide UNE combinations was not inconsistent with the Telecommunications Act of 1996, and thus that the WUTC's order was lawful, in light of U.S. Supreme Court decision in *AT&T Corp.* v. *Iowa Utilities Bd.*, 525 U.S. 366, 119 S.Ct. 721, 736-738 (1999) ("*AT&T Corp.*")); and

**PENNSYLVANIA** Public Utility Commission, *Joint Petition of Nextlink Pennsylvania, Inc., et al.* and *Joint Petition of Bell Atlantic Pennsylvania, Inc.*, Docket Nos. P-00991648 and P-00991649, Opinion and Order dated September 30, 1999, at 85-92 (ordering Bell Atlantic to provide CLECs with UNE-P and with combinations of loops and transport known as Enhanced Extended Loops, or "EELs");

**VERMONT** Public Service Board, *Joint Petition of New England Telephone & Telegraph Company d/b/a NYNEX, NYNEX Corporation, ad Bell Atlantic Corporation for approval of a merger of a wholly-owned subsidiary of Bell Atlantic Corporation into*

*NYNEX Corporation (In Re: Compliance Phase)*, Docket No. 5900, Order dated June 29, 1999, at 97-101 (ordering Bell Atlantic to provide CLECs with UNE combinations, and to "refrain from imposing any additional requirement on the CLEC that it does not impose on itself" in order to obtain access to UNE combinations).

**CONNECTICUT** Department of Public Utility Control, DPUC Investigation Into Rebundling of Telephone Company Network Elements, Docket No. 98-02-01, Decision dated July 8,1998 (requiring The Southern New England Telephone Company and Bell Atlantic to file a tariff for a service from combinations of elements, conforms with the definition of elements adopted by the FCC in its First Report and Order).

The findings of the Rhode Island PUC, regarding the patently discriminatory and anti-competitive nature of Bell Atlantic's refusal to provide UNE combinations voluntarily, echo the similar findings made by the Department in prior orders. The Rhode Island Commission found that:

We disagree with BA-RI that it is premature for the Commission to act, or that the Commission lacks the power to do so. Competitive entry into the local exchange market in Rhode Island would be facilitated if BA-RI is ordered to make available UNEs in any combination requested by a CLEC. BA-RI's refusal to provide UNE combinations would impose wasteful, unnecessary, and anticompetitive costs and delays upon CLECs trying to serve Rhode Island consumers. In addition, BA-RI's refusal to provide UNE combinations to CLECs is unlawfully discriminatory, as it is undisputed that BA-RI routinely uses UNE combinations to provide service to its own retail customers. For example, BA-RI does not first take apart UNE combinations and then rewire them in a new way before using them to provide service to its own retail customers, and it would be unfairly discriminatory for BA-RI to impose such a burden before allowing a CLEC to use more than one UNE to service a retail customer. Similarly, when a retail customer wants to obtain a new line from BA-RI, BA-RI provisions it to the customer directly, without requiring the use of collocation or any other intermediary facilities. Thus, BA-RI's position is inconsistent with 47 U.S.C. § 251(c)(3), which expressly requires BA-RI to provide network elements "on rates, terms and conditions that are just, reasonable and nondiscriminatory".

*Rhode Island UNE Combinations Order* at 3-4. The Commission then held that, "[t]o the extent that federal law does not completely answer the question, the Commission finds that it has authority under state law … to order BA-RI to provide CLECs with UNE combinations." *Id.* at 4.

The Rhode Island Commission has ordered Bell Atlantic to do the following:

1. Bell Atlantic-Rhode Island shall make available to any CLEC all network elements in any combination requested by a CLEC, including but not limited to (a) the so-called UNE Platform, (b) any other combination of elements that BA-RI combines for itself or its own retail customers, in the same manner that BA-RI would combine the elements for its own use or for use by its own retail customers, or in any technically feasible manner requested by a CLEC, or (c) any other combination of network elements in any technically feasible manner requested by a CLEC.

2. Bell Atlantic may not require any CLEC to collocate, in any manner, as a precondition for obtaining access to any UNE or UNE combination, but instead must permit CLECs to use any technically feasible manner of the CLEC's choosing for accessing combinations of network elements.

3. Bell Atlantic may not impose any recurring or non-recurring charge for a UNE or UNE combination that is not based on forward-looking, long-run incremental cost for provisioning the UNE or UNE combination (including the UNE Platform), calculated under the TELRIC methodology.

*Id.* at 4-5. The findings and orders of the Kansas, Washington, Pennsylvania, Vermont, and Connecticut commissions (cited above) are consistent with those quoted above from Rhode Island. Similarly a Department order memorializing BA-MA's new proposal on UNE-P is needed to ensure that local exchange competition can develop without the threat of future discrimination by Bell Atlantic against CLECs regarding access to the functionality of the UNE Platform.

The Department should reflect BA-MA's new stance in an order requiring Bell Atlantic to provide unrestricted UNE-P at TELRIC rates, in all central offices, for all uses and all end-user customers, regardless of whether the loop and switch elements happen to be physically linked together when the CLEC places its order. The narrow pricing issues that Bell Atlantic says it may ask to be revisited based on the FCC's *UNE Remand Order*, see *Bell Atlantic's 12/1/1999 Proposal* at 20, may be addressed if and when Bell Atlantic seeks to negotiate new terms with CLECs, as described in the following sub-section.

**B. Any Future Changes for Density Zone 1 Customers Must be Negotiated or Arbitrated, And Must Include Commercially Reasonable Transition Rules.**

Bell Atlantic takes the position that the FCC's recent *UNE Remand Order* entitles BA-MA to seek three different kinds of changes to the pricing of its new UNE-P offering. *Bell Atlantic's 12/1/1999 Proposal* at 6-11. BA-MA expressly stipulates that these issues would only affect "the pricing of certain elements and not the availability of elements either individually or in combined form." *Id.* at 20. In addition, Bell Atlantic also concedes that it is obligated to attempt to negotiate any of these price changes, and if negotiations are unsuccessful then to arbitrate the issue before the Department. *Id.* at 8, 10-11. For these reasons, the Department need not address any of these issues at this time. Instead, the Department should order BA-MA to provide unrestricted UNE-P as it has proposed, and not address the possibility of proposals to revise any UNE-P prices unless and until they are raised before the Department at a later date.

Nonetheless, it may be useful to describe the limits of the potential pricing issues that BA-MA says it may propose in the future as a result of the *UNE Remand Order*.

First, BA-MA wants to reserve the right to propose a different price for the switching UNE in eight central offices: Bowdoin, Franklin, Harrison, Back Bay, Cambridge-Bent, Cambridge-Ware, Framingham, and Natick. *Bell Atlantic's 12/1/1999 Proposal* at 7 & n.6. Even within these eight central offices, BA-MA acknowledges that it must provide UNE-P for up to three lines per customer. *Id.* at 7-8. Furthermore, Bell Atlantic concedes, as it must, that the FCC's proposed limitation on the obligation to provide switching at TELRIC prices in these central offices will not come into play until BA-MA has "provided nondiscriminatory, cost-based access to the enhanced extended link (EEL) throughout density zone 1." *Id.* at 7 (quoting *UNE Remand Order*, ¶ 278). It is undisputed that BA-MA's existing EEL offering does not meet these requirements, in part because it improperly is restricted to certain loop types. *Id.* at 15-16. Nor has Bell Atlantic demonstrated that it can and will make EELs available on commercially reasonable terms and at appropriate volumes. Bell Atlantic concedes, however, that even if all these conditions were met, BA-MA would still be obligated to provide the switching UNE and to provide UNE-P for use with such customers in these eight central offices, and that the only question would be whether BA-MA could legitimately propose a different rate for the switching UNE component. *Id.* at 7-8. In the meantime, BA-MA has stipulated that it "will continue offering the switching component of … UNE-P arrangements at the approved TELRIC rates," even where a CLEC seeks to lease more than four UNE-P lines to serve a customer in one of the eight Density Zone 1 central offices. *Id.* at 8.(3)

Second, BA-MA wants to reserve the right to propose a different price for the operator services and directory assistance ("OS/DA") component of its unrestricted UNE-P offering. *Bell Atlantic's 12/1/1999 Proposal* at 8-9. BA-MA must first demonstrate that it can successfully offer customized routing, on a commercially reasonable basis, to allow a CLEC to provide its own OS/DA. *Id.* at 9-10. Once again, however, BA-MA concedes that it has an affirmative obligation to offer OS/DA to CLECs, and that the only future question would be whether Bell Atlantic could propose new prices for OS/DA. *Id.* at 10. BA-MA stipulates that unless and until new rates are negotiated or approved, "BA-MA will continue offering the OS/DA component of existing UNE-P arrangements at the approved TELRIC rates." *Id.* at 10.

Third, BA-MA states that it may seek to limit its obligation to provide shared transport for those customers in the eight central offices where it believes it may be entitled to negotiate new rates for the switching component of UNE-P. *Bell Atlantic's 12/1/1999 Proposal* at 10. In the meantime, however, BA-MA has stipulated that it will continue to provide shared transport as an independent unbundled network element at TELRIC rates, and to negotiate or arbitrate any changes in the availability of shared transport after August 14, 2001. *Id.* at 10-11.

If and when Bell Atlantic does propose new prices for UNE-P in limited circumstances on the ground that it is arguably permitted to do so under the FCC's *UNE Remand Order*, BA-MA will have to negotiate an appropriate transition mechanism from the existing UNE-P prices (once they are put into place). It would not be commercially reasonable to change UNE-P prices with little or no warning, after CLECs have developed and perhaps even begun to implement business plans based on current UNE rates. A similar transition mechanism would be needed for implementing a negotiated or arbitrated change to the availability of shared transport as an unbundled element. Once again, however, the question of an appropriate transition mechanism is not yet before the Department, and thus need not be resolved unless and until BA-MA seeks to revise any of the rates for UNEs that comprise some portion of the unrestricted UNE-P offering to which Bell Atlantic has not agreed.

**C. Bell Atlantic Should Be Ordered to Propose Specific Terms and Conditions for UNE-P, Including Timelines for Preparing BA-MA Switches to Handle Customized or Standardized UNE-P.**

The Department should require BA to establish specific rates, terms and conditions for UNE-P, to be resolved through negotiation or otherwise. While BA-MA has suggested that it would make UNE-P available under the terms of negotiated interconnection agreements ("ICAs"), such a proposal is problematic at present because individual interconnection agreements currently lack the necessary detail for a meaningful offering and thus require further negotiation to establish the business rules necessary to implement their UNE-P provisions.

Tariff No. 17, which is being reviewed in Docket DTE 98-57, does not contain any terms or conditions for UNE-P. At the outset of the proceedings in Docket DTE 98-57, in or about April 1999, AT&T requested that Bell Atlantic propose such tariff provisions, but Bell Atlantic refused to do so, stating that it intended to separately tariff UNE-P. In fact, however, Bell Atlantic has never proposed any tariff that would flesh out the details of how CLECs may obtain non-discriminatory access to such combinations.

Existing ICAs do not spell out the procedures and business rules for the provisioning of UNE-P and other combinations in sufficient detail for CLECs to understand the terms and conditions on which BA-MA proposes to offer UNE-P. CLECs therefore cannot create business plans or market to customers based on BA-MA's vague commitment. BA-MA will have no incentive to complete negotiations over such terms and conditions, if its petition under Section 271 is approved and it is allowed to enter the long distance market. BA should be required to specify the terms and conditions under which UNE-P is available, in order to permit CLECs to understand how BA-MA is offering UNE-P in Massachusetts, and to permit the Department to ensure that BA-MA is complying with its orders concerning UNE-P.

One area of contention that should be resolved in establishing these specific terms and conditions is the maximum amount of time that Bell Atlantic will be permitted to take to prepare its switches to accept UNE-P orders for a particular CLEC. Both AT&T and Z-Tel presented comments in Docket 99-271 showing that Bell Atlantic should be able to do this initial preparatory work, to implement the "network design review" process, in no more than 30 to 60 calendar days for UNE-P with customized routing for operator services and directory assistance ("OS/DA"). Bell Atlantic should not be permitted to delay the market entry of CLECs by dragging out this preliminary work for ordering UNE-P.

## II. The Department Should Order BA-MA to Provide Unrestricted EELs, Consistent with BA-MA's Acknowledged Obligation to Do So.

### A. BA-MA's Agreement to Provide EELs for All Loop Types, Including High-Capacity Loops, for All Destinations, Should Be Memorialized in a Departmental Order.

Bell Atlantic acknowledges that under the FCC's *UNE Remand Order* it must make EELs available based on all of the different loop types that may be used by CLECs, including all high capacity loops. *Bell Atlantic's 12/1/1999 Proposal* at 15-16. This commitment should be made permanent in a Departmental order.

BA-MA also acknowledges that CLECs should be permitted to lease EELs in which the transport element terminates either at a CLEC collocation node or at a BA-MA switch. *Id.* at 16. At least one additional option is not mentioned, however. BA-MA is also obligated to permit CLECs to lease EELs with a transport element that terminates at a CLEC switch. *See UNE Remand Order* at 480. The Department should order BA-MA to make available all such permutations of EELs.

### B. BA-MA Should Not Be Permitted to Impose Any Use Restriction on EELs, Unless Consistent With the FCC's *Supplemental Order*.

BA-MA's previous EEL proposal imposed arbitrary use restrictions that barred CLECs from using EELs to provide any service other than POTS or ISDN-BRI. Bell Atlantic has now backed away from that plan, and instead merely reserves the right to propose language "limit[ing] the use of the EEL combination to cases where it is being used by the CLEC to provide a significant amount of local exchange service to its customer or is being used to provide advanced DSL service to the CLECs customer." *Bell Atlantic's 12/1/1999 Proposal* at 16. BA-MA has committed itself to proposing tariff language concerning this issue. The Department has already ordered BA-MA to file its revised EEL tariff in Docket 98-57 by December 27, 1999. The Department can resolve issues raised by this filing in subsequent hearings in Docket 98-57. It need not and should not address them at this time in this docket.

It is not surprising that BA-MA is backing away from its prior proposed use restrictions on EELs, as those restrictions could not be squared with the plain language of the Act. BA-MA has "[t]he duty to provide" UNEs "to any requesting carrier for the provision of a telecommunications service," and to permit UNE combinations to be used "to provide such telecommunications service." 47 U.S.C. § 251(c)(3). The Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public … regardless of the facilities used." 47 U.S.C. § 153(46). It defines "telecommunications" broadly and without limitation, as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43).

Thus, the Act expressly grants CLECs the right to obtain access to unbundled network elements in order to provide *any* telecommunications service, and does not limit the availability of UNEs to the provision of any particular type or types of telecommunications services. The language of the Act, allowing the use of UNEs and UNE combinations for telecommunications between or among "points specified by the user," is completely unconstrained by geographic or other limitations. Therefore, the Act does not limit the availability of UNEs to local exchange or any other geographically defined service. To the contrary, it permits the

use of UNEs to provide transmission between *any* points specified by a user. The Department should specify that EELs must be made available without any use restrictions at this time.

**III. Switch Sub-Platform Pricing Changes Must be Negotiated, or Arbitrated.**

Bell Atlantic says that if and when it seeks to negotiate new switching prices in the specified eight central offices (where a CLEC wishes to order UNEs to provide a customer with more than three lines), it may also seek to revise the pricing of the switch sub-platform combination for use with such customers in such central offices. *Bell Atlantic's 12/1/1999 Proposal* at 16-17. BA-MA stipulates that this potential future issue would be solely "one of pricing - not availability." *Id.* at 17.

Once again, this does not raise any issue which the Department can or should address at this time, as BA-MA would have to attempt to negotiate any changes with the CLECs, before seeking an arbitrated decision by the Department.

**IV. UNE-P, EELs, and Switch Sub-Platform Combinations Must Be Reflected in the Non-Recurring Cost Compliance Filing.**

In the Phase 4-L Order, the Department states that the question of how non-recurring charges will actually be assessed upon CLECs that order unbundled network elements will be addressed "in the next phase of this proceeding, when Bell Atlantic submits its NRC study compliance filing." *Phase 4-L Order* at 26-27. BA-MA should be required, in connection with the compliance filing mandated in the Phase 4-L Order, to explain how final non-recurring charges should apply to CLEC orders for both uncombined and combined UNEs, including UNE-P and EELs. AT&T and other CLECs must be given full opportunity to explore and respond to such a compliance filing.

**Conclusion.**

For the reasons stated above, the Department should:

(1) Order Bell Atlantic to provide unrestricted UNE-P for use by all customers, throughout Massachusetts, at TELRIC rates, on non-discriminatory terms and conditions, and regardless of whether the loop and switching elements happen to be already connected;

(2) Order Bell Atlantic to provide unrestricted EELs for use by all customers, including any loop type (including but not limited to high-capacity loops) and including transport terminating at any location (including a BA-MA switch, a CLEC collocation node, or a CLEC switch), throughout Massachusetts, at TELRIC rates, on non-discriminatory terms and conditions, and regardless of whether the loop and transport elements happen to be already connected;

(3) Specify that any proposed future revisions to the pricing of these unrestricted UNE-P and EELs offerings must be agreed to by the CLEC through negotiation, or approved by the Department after arbitration in an appropriate and fair adjudicatory process;

(4) More generally, grant AT&T's pending motion for reconsideration of the *Phase 4-K Order*, and order BA-MA to (a) perform the functions necessary to combine unbundled network elements in any manner that it currently uses such elements in combination to provide service to itself or its customers, and (b) perform the functions necessary to combine network elements in ways that they are not currently combined in the BA-MA network, unless BA-MA meets its burden of proving to the Department that the requested combination is not technically feasible;

(5) Reject the proposals made in BA-MA's "Compliance Submission" of June 18, 1999, which have been superseded and replaced by the proposals contained in BA-MA's December 1, 1999, filing;

(6) Reiterate (in accord with the Department's *Phase 4-K Order* at 26, and the *Phase 4-N Order* at 33) that BA-MA may not require any CLEC to collocate, in any manner, as a precondition for obtaining access to any UNE or UNE combination, but instead must permit CLECs to use any technically feasible manner of the CLEC's choosing for accessing UNE or combinations of network elements;

(7) Order BA-MA to propose specific terms and conditions for carrying out the mandate described in the preceding paragraphs, in a lawful manner that is consistent with BA-MA's obligations under the Telecommunications Act of 1996;

(8) Order that BA-MA may not impose any glue fee or any other recurring or non-recurring charge for UNE-P or any other UNE combinations that is not based on the forward-looking, long-run incremental cost for provisioning the UNE combination, calculated under the FCC's TELRIC methodology; and

(9) Order BA-MA to include, in the non-recurring cost compliance filing mandated by the *Phase 4-L Order*, non-recurring charge proposals for UNE-P, EELs, and the Switch Sub-Platform, consistent with the Department's *Phase 4-L Order* (as revised in accordance with MCI WorldCom's pending motion for reconsideration) and with Bell Atlantic's obligation to base any non-recurring UNE charges on forward-looking costs derived in accordance with the FCC's TELRIC methodology.

Respectfully submitted,

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Dated: December 15, 1999.

CERTIFICATE OF SERVICE

I hereby certify that I caused a true copy of the above document to be served upon the attorney of record for each other party on December 15, 1999.

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1. 1 On June 10, 1999, AT&T filed a motion for partial reconsideration, urging the Department to order BA-MA to make available any technically feasible UNE combination requested by a CLEC, if BA-MA failed voluntarily to make a proposal to do so. AT&T asked the Department to reconsider and revise those portions of its Phase 4-K Order that: (i) conclude that BA-MA is under no obligation to combine unbundled network elements ("UNEs") not currently combined in BA-MA's network, or (ii) decline to rule whether the Department has the power to impose such an obligation under Massachusetts law, and declines to order BA-MA to do so. That motion remains pending.

2. 2 Bell Atlantic's desire to be able to negotiate different prices in the future for the switching component of UNE-P, for certain customers within the eight "Density Zone 1" offices, is discussed in the following section of this brief, Section I.B.

3. 3 The quoted sentence makes this stipulation with respect to "existing UNE-P arrangements only," but later in the document BA-MA stipulates that it will provide the same terms for all UNE-P arrangements, including situations where a loop and switch must be connected in order to provision a UNE-P order. *See Bell Atlantic's 12/1/1999 Proposal* at 13.